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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Case No. 642

WESTERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

DAIRY DISTRIBUTORS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion in the case of the United States Court of Appeals for the Tenth Circuit is reported at 294 F. 2d 348, and a copy of that opinion is included in the Appendix of petitioner's brief. The opinion of the United States District Court is unreported. The opinion in this case of the Supreme Court of Utah is reported at 329 P. 2d 414, and a copy of that opinion is attached to this brief as Appendix "A".

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court upon the provisions of Title 28, Section 1254(1) of the United States Code.

QUESTIONS PRESENTED

1. Whether the doctrine of res judicata bars a Federal District Court from enjoining the respondent (Dairy Distributors, Inc.) from enforcing a state court judgment as against petitioner (Western Conference of Teamsters) rendered under Section 303 of the Labor Management Relations Act because of a claimed misinterpretation of the Act.

2. Whether a Federal District Court is bound under the doctrine of res judicata by the previous judicial determination of the nature of respondent's business.

STATUTES INVOLVED

Section 303 of the Labor Management Relations Act, designated at Title 29, Section 187, U.S.C.A.:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services, where an object there of is —
> "(1) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having the jurisdiction of the parties, and shall recover the damages by him sustained and the cost of suit. June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title III, Para. 303, 61 Stat. 158."

Title 29, Section 185(e), U.S.C.A., which reads as follows:

"For the purpose of this section and in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed where actually authorized or subsequently ratified shall not be controlling."

STATEMENT

A. Factual Background

The respondent, Dairy Distributors, Inc., is a Utah corporation owned by the Edwin Gossner family.

The company was formed for the principal purpose of marketing the cheese produced by Cache Valley Dairymen's Association, Smithfield, Utah. The company carried only those goods which were purchased and owned by the respondent (R. 111). It had been licensed by the Interstate Commerce Commission office at Salt Lake City, Utah, as a private carrier (Opinion of Appeal Court for the Tenth Circuit, 294 F. 2d, 348, 353).

Dairy Distributor's principal source of income was from business transacted with Dorman and Company of New York City, a wholesale cheese dealer (R. 264). The respondent company then purchased commodities in the Eastern United States and carried them back to Utah (R. 263).

In an effort to obtain a new bargaining agreement with the employees of Cache Valley Dairy Association, the representatives of Local 976, Joint Council 67, and the petitioner went to New York and there with the aid of New York Local 277, whose members worked for M. Dorman and Company, urged the latter company to cease dealing with the Dairy Distributors, Inc. On July 26, 1955, and on two subsequent occasions, representatives of Local 976 and the petitioner picketed the trucks of Dairy Distributors, Inc., at Dorman's loading platform in New York City (R. 223-227). As a result of these incidents, which induced Dorman to cease doing business with the respondent, the latter company was forced out of business. Litigation and the judgment from which petitioner seeks relief resulted.

B. State Court Proceedings

A review of the course of the original litigation is necessary for a proper understanding of the nature of the relief which the petitioner seeks.

The course of the litigation in the state courts is as follows:

1. The action was originally filed in the Third District Court in and for Salt Lake County, Utah, and was an action for damages pursuant to the Taft-Hartley Act.

2. Prior to trial, a Motion to Dismiss was filed on behalf of the Western Conference of Teamsters (petitioners in this action), one of the defendants in the state court action, attacking the jurisdiction of the trial court (R. 30). This motion was heard by one of the divisions of the Third District Court and was denied.

3. The case was tried in the Third District Court in and for Salt Lake County, Utah, and resulted in a verdict and judgment against the defendant therein, the petitioner here, and other defendants, and a judgment was entered upon a jury verdict (R. 240). In the answer of Western Conference of Teamsters, defendants in the original action and petitioner here, the question of the Court's jurisdiction was raised asserting that the Western Conference of Teamsters was not subject to the service of process of the state court (R. 237, 230). At the end of the plaintiff's case in the state court action, a Motion to Dismiss upon

the same ground presented in this petition that the Western Conference of Teamsters was not the kind of organization which could be sued under the provisions of the Taft-Hartley Act, was argued to the trial judge and denied.

4. An appeal was taken by the Western Conference of Teamsters and other defendants to the Supreme Court of Utah. The points raised upon appeal by the Appellants, including petitioners, in the Supreme Court of Utah (R. 35, 36 and 37) were as follows:

a. The adequacy and effectiveness of service on the defendants.

b. Whether the Western Conference of Teamsters was the kind of organization which could be sued for damages under the Taft-Hartley Act.

c. The alleged violation of the Interstate Commerce Act by the plaintiff in the state action, Dairy Distributor's, Inc.

The Supreme Court of Utah held against the Western Conference of Teamsters and other defendants and affirmed the judgment. The opinion of the Utah Supreme Court is found at Pages 221 to 232, inclusive of the record, and is set forth in the Appendix of this brief.

5. The defendants in the state court action, including the Western Conference of Teamsters, petitioned the Supreme Court of Utah for a re-hearing (R. 38 & 39). The points raised in the Petition for Re-hearing were among those raised on the original

appeal. The Supreme Court of Utah denied a re-hearing.

6. The defendants then, including the Western Conference of Teamsters, petitioned the Supreme Court of the United States for a Writ of Certiorari raising among other things the following points:

(a). The Western Conference of Teamsters could not be sued under the provisions of the Taft-Hartley Act.

(b). That the plaintiff had illegally operated his business in violation of the Interstate Commerce Act.

7. The Petition for Writ of Certiorari was denied by this Court, June 15, 1959, *Local Union 976 et al, petitioners, v. Dairy Distributors, Inc. No. 856*, 360 U.S. 909, 3 L. Ed. 2d 1259, 79 Sup. Ct. 1294.

The foregoing is a summary of the course the litigation took in the courts of the State of Utah and on petition for a Writ of Certiorari to the Supreme Court of the United States.

C. Federal Court Proceedings

1. The action in the United States District Court for the District of Utah, Central Division, was commenced by the Western Conference of Teamsters, Petitioner, only and not by the other defendants. The petition sought to enjoin the enforcement of the state court judgment against the Western Conference of Teamsters by Dairy Distributors, Incorporated.

Among other points raised by the petition in the United States Court were the following:

(a). That the petitioner, Western Conference of Teamsters, was not the sort of labor organization which could be sued under the provisions of the Taft-Hartley Act.

(b). That no proper service of process was effected in the State of Utah and therefore the state court did not acquire jurisdiction over the petitioner, Western Conference of Teamsters.

(c). That the defendant in the United States Court action, Dairy Distributors, Incorporated, was engaged in an illegal business without proper authority from the Interstate Commerce Commission and, therefore, not entitled to recover (R. 43 & 44).

It thus appears that the matters presented for determination by the United States Court had been raised by the Western Conference of Teamsters in the state court proceeding, and were litigated and decided against said Petitioner at every stage of those proceedings.

2. At the onset of the trial in the United States Court, Respondent (Dairy Distributor's Incorporated), renewed its previous Motion to Dismiss (R. 53) and further objected to the introduction of any testimony upon the same ground urged in support of a Motion to Dismiss and an earlier Motion for Summary Judgment (R. 51).

3. At the conclusion of the trial, the matter was taken under advisement by the trial judge. Thereafter, on June 25, 1960, the trial judge made an oral ruling

which is set forth in the record (R. 141) and found the issues in favor of the Western Conference of Teamsters, Petitioner, and against Dairy Distributor's, Incorporated.

4. Based upon the findings and conclusions finally adopted by the trial judge, an Order was issued permanently enjoining the defendant, Dairy Distributor's, Incorporated, from enforcing the state court judgment against the Western Conference of Teamsters, Petitioner.

5. Thereafter, appeal was had to the Circuit Court of Appeals for the Tenth Circuit and the opinion of the Tenth Circuit Court is reported at 294 F. 2d 348, and is also set forth in the Appendix of appellant's brief, wherein the Federal District Court judgment was reversed and remanded with directions to vacate the injunction. Thereafter, a Petition for rehearing was denied by the Circuit Court en banc October 3, 1961, and this Petition followed.

ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY HELD THAT THE DOCTRINE OF RES JUDICATA BARRED THE FEDERAL DISTRICT COURT FROM ENJOINING THE RESPONDENT FROM ENFORCING A STATE COURT JUDGMENT AS AGAINST THE PETITIONER.

All issues raised by the petitioner have been passed upon and adjudicated by the Third District Court of the State of Utah, the Supreme Court of

Utah, and resolved against the petitioner. The relief sought by the petitioner in the United States District Court required it to sit as an appellate court, and it was without jurisdiction to entertain or hear any proceedings pertaining to the same. Further, the acquisition of jurisdiction of the petitioner by the Utah Trial Court was raised, litigated and resolved against the petitioner at every stage of the proceedings in the state courts. The same applies with respect to the petitioner's present contention that the State Court misapplied the federal law in asserting jurisdiction over the petitioner. To permit a Federal District Court to relitigate these issues would allow a dissatisfied litigant having tried his lawsuit in the state court system, to petition the United States District Court for an Order enjoining the enforcement of the Judgment, and to begin the litigation all over again in the federal system in the hope of obtaining a more favorable result.

In support of the foregoing propositions of law, attention is invited to the case of *American Surety Company of New York* vs. *Baldwin*, 287 U. S. 156, 166, 169, 53 Sup. Ct. 98, 77 L. Ed. 231 (1932). In that case an action was filed in the U. S. District Court of Idaho for an injunction against the defendant as the sheriff of Ada County, Idaho, to enjoin him from enforcing a state court judgment.

The United States District Judge held that the Idaho Court had made a mistake in construing a contract, but further held that the state court had juris-

diction of the subject matter and the parties, and that the judgment entered was not void and should not be interferred with by the United States Court.

The Ninth Circuit Court of Appeals reversed the decision of the United States trial judge. This Court reversed the Ninth Circuit affirming the decision of the trial judge. The opinion in that case written by Mr. Justice Brandeis says as follows:

> "The principles of res judicata apply to questions of jurisdiction as well as to other issues. They are given affect even where the proceedings in the federal court is to enjoin the enforcement of a state judgment, if the issue was made open to litigation in the original action or was determined in an independent proceeding in the state courts."

The opinion of Justice Brandeis further states:

> "The full faith and credit clause, together with legislation pursuant thereto, applies to judicial proceeding of a state court drawn in question in an independent proceeding in the federal courts. (U.S.C. 28 paragraph 687, *Mutual Life Insurance* vs. *Harris*, 97 U. S. 331, 24 L. Ed. 559 (1877))."

The opinion continues:

> "Federal claims are not to be prosecuted piece meal in state and federal courts, whether the attempt to do so springs from a failure reasonably to adduce relevant facts, . . . or from a failure seasonably to pursue the appropriate state remedy."

The case of *Baldwin* vs. *Traveling Men's Association*, 283 U. S 522, 51 Sup. Ct. 517, 75 L. Ed. 1244

(1930), is also relied upon by respondent. Plaintiff recovered judgment against the defendant in the United States Court for the Western District of Missouri. Thereafter, the defendant attacked the judgment in the United States Court for the Sourthern District of Iowa, claiming among other things that the defendant was not properly within the jurisdiction of the Missouri Court although the defendant twice appeared in the original action and contested jurisdiction. In holding that the earlier judgment was res judicata on the question of jurisdiction, this court struck down the collateral attack in the following language:

> "Public policy dictates that there be an end of litigation; that issues tested shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard and why he should not in the absence of fraud be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The case of *Forsyth* vs. *Hammond*, 166 U. S. 506, 517, 17 Sup. Ct. 665, 41 L. Ed. 1095 (1895), has striking similarities to the one under consideration. There, the City of Hammond, Indiana, sought to include within its limits some property belonging to Forsyth. After a trial in the Indiana State Court, the rights of the city to annex the property were upheld. Forsyth was a party to those proceedings. This decision was ap-

pealed by Forsyth and others to the Supreme Court of Indiana and the trial court was affirmed.

A bill was then filed by Forsyth in the United States District Court to enjoin the collection of taxes. The United States Court dismissed the bill, but the United States Circuit Court for the Seventh Circuit reversed the District Court, and the City of Hammond appealed to this tribunal, which reversed the decision of the Court of Appeals for the Seventh Circuit.

Of importance concerning the application of the doctrine of res judicata to state determinations of jurisdiction is the following language from that opinion:

> "But after an adverse decree, she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the City of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions, both of error and of jurisdiction, were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principal res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another

> action between the parties, but whether it is not binding between the same parties in that or any other form. The principals controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent action."

The decision then quotes in support the following cases: *Cromwell* vs. *Sac County*, 94 U. S. 351, 24 L. Ed. 195 (1877); *Mason Lumber Company* vs. *Buchtel*, 101 U. S. 638, 25 L. Ed. 1073 (1879); *Stout* vs. *Lye*, 103 U. S. 66, 26 L. Ed. 428 (1880); *Nesbitt* vs. *Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562 (1891); *Johnson Company* vs. *Wharton*, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429 (1893); *Last Chance Mining Company* vs. *Tyler Mining Company*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859 (1894).

The more recent opinions of this Court also support respondent's contention, of which *Scherer* vs. *Scherer*, 334 U. S. 343, 349-350, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948), is representative. The following language is quoted from that opinion which sustained a Florida State Court's determination of jurisdiction against collateral attack in Massachusetts.

> "The question of what affect is to be given to an adjudication by a court that it possess requisite jurisdiction in the case, where the judgment of the court is subsequently subjected to

> collateral attack on jurisdictional grounds has been given frequent consideration by this court over a period of many years. Insofar as cases originating in the Federal Courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter, where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate.
>
> "The reasons for this doctrine have frequently been stated. Thus, in *Stoll* vs. *Gottlieb*, 305 U. S. 165, 172, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938), it was said:
>
> 'Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin the litigation. After a party has his day in court with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to the jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.' "

The opinion further says:

> "This court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause, where, under the law of the state in which the original judgment was rendered such adjudications are not susceptible to collateral attack."

The petitioner seeks to avoid application of the

doctrine of res judicata claiming that public policy requires it. This contention is based upon certain cases cited in its brief at Pages 14 and 15. However, as will appear, those cases do not support such a broad proposition and are clearly distinguishable from the case under consideration.

In the case of *Kalb* vs. *Feuersteine*, 308 U. S. 433, 439, 440, 60 Sup. Ct. 343, 84 L. Ed. 370, (1940), this court held that a Wisconsin County Court did not have jurisdiction to foreclose a mortgage while a petition was pending in the Federal Court under the bankruptcy (Frazier-Lemke) act. The acts of the state court were declared to be "nullities" and "subject to collateral attack". The language of Mr. Justice Black writing for this Court reads:

> "The constitution grants Congress exclusive power to regulate bankruptcy and under this power, Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."
>
> * * *
>
> "We think the language and the broad policy of the Frazier-Lemke Act conclusively demonstrates that Congress intends to, and did deprive Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending."

The Frazier-Lemke Act specifically withdrew jurisdiction from the state courts and any proceedings

in contravention of that Act were "nullities". This is in contrast to the Taft Hartley Act under which jurisdiction was specifically granted to both federal and state courts, and under which the course of litigation in the State Courts in this case proceeded.

In *United States* vs. *U. S. Fidelity Company*, 309 U. S. 506, 512, 513, 60 Sup. Ct. 653, 84 L. Ed. 894, (1940), cited by Petitioner, a federal statute which prohibited cross-claims against the United States also included certain Indian nations involved in litigation. In holding that a Missouri Federal District Court decision did not bar a subsequent action filed on behalf of the Indian nations in the Mississippi Federal District Court, this Court stated:

> "We are of the view, however, that *the Missouri judgment is void* insofar as it undertakes to fix a credit against the Indian nations . . . No statutory authority granted jurisdiction to the Missouri court to adjudicate a cross claim against the United States."

The Court continued with the following language:

> "The reasons for the conclusion that this immunity may not be waived governed likewise the questions of res judicata. As no appeal was taken from this Missouri judgment, *it is subject to collateral attack only if void.* It has heretofore been shown that the suability of the United States and the Indian nations, whether directly or by crossaction, depends upon affirmative statutory authority. *Consent alone gives jurisdiction to a judge against the sovereign. Absent that consent, the attempted exercise of the judicial power is void . . . Public policy forbids the suit unless consent is given, as clearly as public*

policy makes jurisdiction exclusive by declaration of the legislative body." (Emphasis added)

This case does not support the proposition urged upon this court by the petitioner. By congressional act, jurisdiction to entertain a suit by the state court had been specifically withdrawn and any proceeding in violation of that injunction was void and subject to collateral attack. In the present case, the Utah State Courts proceeded under specific authorization of Section 301 of the Labor Management Relations Act.

Again in the case of *Denver Building and Construction Trade Council* vs. *National Labor Relations Board*, 186 F. 2d 326 (1950), cited by petitioner, the doctrine of res judicata was held not to defeat a statutory "method devised by Congress" of pursuing a remedy. No such issue is presented in this case.

It is submitted that no issue was presented to the Federal District Court in the Petition for Injunctive Relief which had not theretofore been raised and decided against the petitioner at every stage of the proceeding, and the doctrine of res judicata bars consideration of those issues. and every other issue petitioner had an opportunity to raise in the original proceeding. *Chicot County Drainage District* vs. *Baxter State Bank*, 308 U. S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329, (1940).

Notwithstanding, the contention of the petitioner, it is respondent's further contention that based upon the record made in the trial conducted before the United States District Court that the trial judge should have concluded that jurisdiction of the Western

Conference of Teamsters was acquired originally by the Utah State Court and that it was a labor organization within the meaning of the Taft-Hartley Act and, therefore, subject to suit as such under the provisions of that Act in the state court. With the jurisdiction conferred upon the state court under Section 301 of the Labor Management Relations Act, there was impliedly granted the right to interpret the Act.

Misapplication or misinterpretation of the Act is not a sufficient basis upon which to collaterally attack the judgment of the state court. A successful collateral attack, as observed from the cases cited above, can only be sustained where the judgment is void. No such contention is or can be made in the present case. Adequate protection against claimed inconsistent federal and state interpretations or applications lies in the power of this court to review by certiorari the judgments of the State Supreme Court. A petition has previously been made to this court for a Writ of Certiorari to the Supreme Court of Utah and denied, in which this petitioner sought to have the identical questions which it now seeks to have again reviewed, brought before this Court. Language taken from petitioner's initial Petition for Writ of Certiorari to the Supreme Court of Utah, reads as follows:

> "It is apparent that the court below had greviously applied Section 301(e) to impute responsibility to the Western Conference . . . and further has ignored the decision of this court as well as other federal courts applying rules of agency both at common law and under the Taft-Hartley Act." (Page 17)

Again, the petitioner asserted in his brief:

> ". . . the court (Supreme Court of Utah) below has . . . construed and applied a Federal Act in an erroneous manner and in disregard of applicable decisions of this and of other federal courts, so as to require correction here . . ."
>
> * * *
>
> "The issues presented in this case can be resolved only by this court, and any error in the court below in applying the federal law can be corrected only by this court." (Page 13)

It is respectfully submitted on the law and authority cited above, that the petitioner has previously exhaused its right of review and the doctrine of res judicata bars further action concerning this matter in the Federal District Court, and the opinion of the Circuit Court for the Tenth Circuit to that effect should stand.

II.

A FEDERAL DISTRICT COURT IS BOUND UNDER THE DOCTRINE OF RES JUDICATA BY THE PREVIOUS JUDICIAL DETERMINATION OF THE NATURE OF RESPONDENT'S BUSINESS.

The argument relative to the applicability of the doctrine of res judicata as set forth above, applies with equal force and effect to the state court's determination that respondent was not operating in violation of the Interstate Commerce Act (49 U.S.C. 1, et seq.). Nevertheless, petitioner asserts that the Federal District Court had jurisdiction to make a redetermination of this issue even after appellate procedures in the state court proceedings had been exhaused. The petitioner, ignoring the state court record concern-

ing this issue represents to this Court that the evidence introduced in the Federal District Court "proved that respondent operated as a 'contract carrier' and respondent admitted that it did so without an I.C.C. permit" (Petitioner's brief, p. 19). The record is contrary to this bold assertion. Respondent was a private carrier and conducted its affairs accordingly, and has never admitted that it operated as a contract carrier. Based upon the present record the Appeal Court for the Tenth Circuit found:

> "The record here indicates that the Commission has licensed the appellant (respondent here) as a private carrier; no complaint of this action has been made to the Commission; and if damage arose as a result of improper licensing or improper use of the granted certificate, it is not apparent." (294 F. 2d 348, 353).

Further, even if said violations were found to have existed the Interstate Commerce Act does not provide for a defense, sounding in tort, for violations of the provisions of the Act. The enforcement and sanctions stated in the Act are left to the exclusive control of the Commission. (49 U.S.C. § 12(1), 13(1), 16, 28 U.S.C. § 2321).

In any event, a factual question was presented at the trial in the state court concerning the alleged illegal operation of respondent. The jury and the trial judge rejected the contention of claimed illegal operation as did the Supreme Court of Utah. In addition, this Court in reviewing a Petition for Writ of Certiorari to the Supreme Court of Utah, impliedly re-

jected the same claim. That allegation as it appeared in the original Petition at page 3, reads as follows:

> "(4) The Court wrongfully applied federal law under the Interstate Commerce Act thereby depriving petitioners of the defense that respondent, illegally operating without an I.C.C. permit, could not recover . . ."

With the denial of that writ, petitioner's right to further review ended.

Concerning the power and duty of this Court to review on appeal, factual matters as well as legal questions, the following language of Mr. Justice Hughes, speaking for the Court in *Norris* v. *Alabama*, 294 U. S. 587, 589, 55 Sup. Ct. 579 (1935), is pertinent:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth the federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and finding of fact, are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

The United States Court of Appeals for the Tenth Circuit correctly observed that:

> ". . . Adequate protection against the frustration of federal law by unsound interpretation or application in state courts lies in the power of the Supreme Court of the United States to review by certiorari the judgments of state supreme court upon matters of federal or constitutional law." (294 F. 2d 348, 352)

But petitioner contends that the policy of the United States cannot be disregarded by the states. This is conceded. However, there is no showing here that such a policy has been ignored by the state courts. A finding of fact concerning this issue of the lawsuit was made and petitioner thereafter urged its disagreement with that finding upon every court judicial procedure would permit. Surely, a private disagreement with an affirmed judicial finding cannot be considered a contravention of the policy of the United States or a matter with which this court should be concerned.

From the very start of this litigation, petitioner has asserted the claim of illegality of respondent's business. The conclusion is inescapable that petitioner has never been able to prove the facts upon which the claim of illegality must rest.

Stripped of all the verbiage in which petitioner dresses that claim, its naked contention is that by merely reasserting the claim, this Court is required to review it.

The most charitable appraisal of petitioner's approach reveals it would like to persuade this Court that because factual issues, fairly contested, were al

ways decided against petitioner, there has been a subversion of federal policy.

Mere inconsistency in application of a federal statute, if such were found to exist, is not a sufficient basis upon which the relief of this court can be invoked. In the case of *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 376, 84 L. Ed. 329, 60 Sup. Ct. 317 (1940), a bondholder was held bound by an adjudication made under the Municipal-Debt Readjustment Act of 1934, from which no appeal was taken, even though the same Act was held unconstitutional by this Court in another case. Mr. Chief Justice Hughes speaking of the trial court's decision wrote as follows:

> "Their determinations of such questions, while open to direct review, may not be assailed collaterally."

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, the Petition for a Writ of Certiorari should be denied.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8823

DAIRY DISTRIBUTORS, INC.
PLAINTIFF AND RESPONDENT,

v.

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, ET AL.,
DEFENDANTS AND APPELLANTS.

HENROID, Justice:

Appeal from a judgment entered on a verdict in favor of plaintiff in a case having to do with Title 29, Sec. 187 United States Code Annotated (Sec. 303, Labor Management Relations Act; June 23, 1947, c. 120, Title III, Sec. 303, 61 Stat. 158).[1] Affirmed. Costs to plaintiff.

Defendants at some length have abstracted the evidence of the rather voluminous record. Understandably they have recited facts properly presentable to a

[1] "(a) It shall be unlawful, for the purpose of this section only in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

jury that include those appearing most favorable to their own contentions. However, as we have indicated many times, in reviewing the facts in a case like this, we must do so in a light that most strongly supports the verdict, and we must go along with the verdict unless it clearly is not supported by any substantial evidence.

We believe the following to be a fair recital of such facts that the jury well may have believed to be true:

Prior to 1950, at Amalga, Utah, a co-operative association of milk producers, Cache Valley Dairymen's Association, managed by one Gossner, manufactured and distributed cheese over a wide area, including east and west coast points. Principal customer was Dorman & Co., New York City. In 1950 the Utah-Idaho Central Railroad discontinued business, and as a result the Association lost its railhead. Use of other railroads made competition with Wisconsin cheese in the New York area prohibitive. Under our statutes and the Association's articles, it could not operate a transportation business. Without a back haul from the east, the Association could not have competed, with its own equipment, in the New York market. It was suggested, therefore, that Gossner form a trucking company, which he and his immediate family and one other did, incorporating the plaintiff, Dairy Distributors. This corporation purchased cheese from the Association, shipped and sold it to Dorman in New York, purchasing back haul commodities there (principally calcium chlorite) for resale here.

The Association and the Corporation were separate businesses, created for different purposes, and having different shareholders. The operations of each inured to the benefit of two different groups of people. Counsel for defendants seems to have conceded all this when, objecting to the introduction of a letter addressed to the Association, he observed that the Association was "not this Dairy Distributors at all—it is a different company."

The plaintiff Corporation had an annual $1,500,000 gross operation from September, 1952, to the latter part of July, 1955, enjoying a monthly profit of about $1,000, and acquiring assets of about $50,000. During this period, plaintiff constantly had one truck headed for Dorman's with a $12,000 cargo of perishable cheese, and one headed west with a back haul. Plaintiff had experienced no labor trouble whatsoever with defendants, although the Association had. Local 976 had been signatory to a contract with the Association, but upon its termination, negotiations for renewal at increased wages failed. Thereafter the union suspended all of its members working for the Association for failure to cooperate with the union. It later took the position such employees were no longer members of the union, as is reflected in the banner (see cut) employed on a picket line that proved to become a vital link in the chain of events culminating in this litigation.

Since the Association and the plaintiff Corporation were separate entities and businesses, the labor problems of the Association do not appear to us to be

germane to the issues here, save as they constitute an historical, causative backdrop leading to the picketing of Dorman and plaintiff's equipment, resulting in the discontinuance of plaintiff's shipments to the former.

In May, 1955, one Rash, Secretary-Treasurer of Local 976, accompanied by one Ballew, troubleshooter loaned by a Seattle labor agency to assist Local 976 in its negotiations with the Association, went to New York to see one of the Dormans. They enlisted the aid of one Ristuccia, Secretary-Treasurer of New York Local Teamster Union 277 that represented Dorman's employees, in making the approach. The conceded purpose of the visit was to urge Dorman to pressure the Association into bargaining with Local 976, and in aid thereof to urge Dorman to refuse acceptance of any more cheese manufactured by the Association.

On July 26, 1955, a load of plaintiff's cheese arrived at Dorman's dock early in the morning, as did Local 976's representatives. Rash, Ballew and one Lott. Mr. Rosen, member of the New York Teamsters' Local and Dorman's foreman, having been advised that his union had sanctioned the picketing refused to unload the shipment. A picket banner appeared and Dorman's establishment and plaintiff's truck were picketed by Rash and Lott, and the cheese was not unloaded until five o'clock the same day. Dorman contacted Gossner in Utah and advised him that there was a picket line in front of his place of business picketing Dairy Distributors' truck, advising that his employees would not cross the picket line and did not want to unload the cheese.

The subjoined snapshot shows the picket banner and the wording used thereon.

Plaintiff shipped no more cheese to Dorman's until about six weeks later, on September 7, when Rosen told the driver the cheese could not be unloaded until the Dormans arrived. The Dormans advised him that the union would have to be contacted. Following such contact, he was told that the union would not permit the unloading. The cheese was not unloaded but was taken elsewhere and placed in storage.

Plaintiff made one more attempt to ship cheese to Dorman's about two months later, on October 31, 1955, when the plaintiff's equipment again was picketed. Plaintiff's truckdriver stated that the truck was unloaded "by Dormans and myself and a couple of Dorman boys." Plaintiff made no effort thereafter to sell cheese to Dorman's but liquidated its trucking business, a result caused by the picketing and interference with plaintiff's business dealings with Dorman. It had been made clear that Dorman's place of business and the plaintiff's equipment would be the subject of continued picketing whenever it was deemed advisable to foster the union's cause.

Under such circumstances it would not seem to be unreasonable for the jury to conclude that defendants, in violation of the act, induced and encouraged Dorman *and* its employees to refuse to use, process or otherwise handle or work on the commodities of the plaintiff with the objects of 1) forcing Dorman's to cease doing business with any other person and 2) forcing the Association to bargain with the union.

We think the believable facts in this case reasonably and successfully challenge the contention of defendant's Point I and its subdivisions, which are to the effect that: Plaintiff failed to show the essential element making compensable a violation of the act; A. Because it 1) did not show an appeal to Dorman's non-supervisory employees, 2) who, they say, were influenced only by their employers, 3) who, in turn were the only ones appealed to by the union; B. Because it failed to show a statutory object sought by the picketing; C. Although Local 976 was not certified as bargaining agent for the Association's employees, it enjoyed a status tantamount thereto; and D. Because it failed to show an unlawful attempt by defendants to accomplish a statutory object.

Touching on some of the subdivisions of Point I, we are not convinced by the arguments of counsel for defendants relating to an equivalence of certification in the light of the facts that 1) the union had suspended its members employed by the Association, for lack of cooperation with the union which now claims to be their bargaining agent;2) the picket banner employed, itself negatived the idea that the union was bargaining agent by clearly branding the Association's employees as "non-union" (see cut); and anyway, 3) the union's activity was at the Dorman's place of business and alongside plaintiff's truck, certification as to the Association's employees having nothing to do with the issues involved here.

To argue that certification or its equivalent had something to do with this case would be to assume that

the Association, not the plaintiff, delivered the cheese to Dorman's in New York. The concession of defendants that the Association and the plaintiff Corporation were independent organizations, supported by substantial evidence in the record, does away with any such assumption and disposes not only of the defendants' suggestion to the contrary, but of any necessity to discuss ambulatory picketing and alter ego matters, or the authorities presented by either side in support thereof.

As to the matter of who was induced to act, we cannot agree with defendants that there was no evidence of any appeal or inducement directed to non-supervisory employees to refuse to unload or handle the plaintiff's commodities, because the union representatives talked only to the Dormans and the foreman Rosen. To contend so is to challenge the silent potency of a peaceful picket line, and is to ignore the very purpose of such a line: Persuasion. It is to blind oneself to the words of the picket banner, with its pointed suggestion that loyal union members (Dorman's was a union establishment) should not handle the cheese. Further, it would seem to give little credit to the understanding and reaction of Dorman's union employees by intimating that only the conversations of Rash and the others with Dorman and Rosen, and not the presence of or the suggestiveness of the picket banner, had anything to do with the refusal to handle the cheese and the subsequent demise of a profitable business. The cold facts are that after enjoying congenial and profitable business relations with Dorman's for more

than two years, with deliveries of cheese at least once a week, the first picketing by the union agents ended all that, and in three and a half months thereafter plaintiff attempted but two shipments, the first being refused, requiring storage, and the second being picketed. Coupled with these facts, Dorman had advised the Association that his men would not cross the picket line and did not want to unload the cheese. It is not reasonable to believe that this course of events would have occurred without the picketing, and it is difficult to understand why the union would engage in this picketing if it were not designed to appeal to and influence the employees. We believe the jury, contrary to the contentions of defendants, reasonably could have found that the picket line 1) *did* appeal to the employees, and that 2) the Dormans *were* expressing the feeling and intentions of the employees when they announced that their men would not cross the picket line and would not unload cheese processed by the Association, and 3) that because the employees indicated they would not cross the picket line, plaintiff's relations with Dorman's as a practical matter, were terminated.

Defendants' Point II contends that the Western Conference of Teamsters is exempt from this litigation, not being a labor organization within the contemplation of Title 29, Sec. 152 (5) U.S.C.A.[2] There is evidence in the record to indicate that Western Con-

[2] "The term 'labor organization' means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

ference of Teamsters had jurisdiction over local teamster unions in the 11 western states; the Local 976, of which Rash was an officer, was affiliated with the Western Conference, and that it in turn was affiliated with the International Union. Under such circumstances we cannot say that the Western Conference of Teamsters was not a labor arganization under the broad definition of the act.

The facts hereinabove mentioned, together with the facts that defendants' answer admitted that Local 976 of which Rash was an officer and Joint Council 67 engaged in picketing, the trustees for Local 976 apparently was appointed by the International Union and that Local 976 members paid part of their dues to the International, seem to dispose of defendants' Point III and IV having to do with the contention that the Western Conference and the International were strangers to this action for lack of a principal-agent relationship. We think a factual ussue was precipitated such that we cannot say as a matter of law no agency existed.

We are not unmindful of the administrative pronouncements cited by defendants relating to agency, nor the general proposition that agency must be shown by him who asserts it. We feel that a jury reasonably could have concluded that plaintiff sustained its burden of proving agency and we choose to go along with plaintiff's cited authorities, insofar as the facts of the instant case are concerned, and also to assert that agency, provable circumstantially, has taken on a

meaning under the Taft-Hartley Act that includes ostensible authority, a matter not included within the Wagner Act.[3]

In the Ninth Circuit decision[4] involving the same legislation as we have here, the court, after referring to Title 29, Sec. 185 (e),[5] stated:

> "Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act . . . and the decision of the United Brotherhood of Carpenters * * * v. U. S., 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973. We think the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act then the union is responsible."

In United Mine Workers v. Patton,[6] it was said:

> "The chief argument of defendans in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the strikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the Field Representative

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[3] 29 U.S.C.A 151 et seq.

[4] International Longshoremen's, etc. Local 8 v. Hawaiian Pineapple Co. 226 F.2d 875.

[5] "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling (June 23, 1947, c. 120 Title III, § 301, 61 Stat. 156.)"

[6] 4 Cir., 211 F.2d 742, 746.

of the U.M.W., who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment (citing cases)."

Points V through IX claim error in failing to grant motions for directed verdict at various stages of the proceedings, because 1) any evidence of damage was so speculative as not to support the verdict, 2) plaintiff had no contract with the Assocation or Dorman's, 3) there was no evidence that Dorman's refused to purchase cheese because of the picketing, 4) Dorman's were willing to continue said purchases, and 5) because plaintiff's hauling business was an unlicensed interstate operation. All of these contentions, except 2) are supported by evidence to the contrary which the jury could have resolved and did resolve in favor of the plaintiff, which conclusions we are not constrained to upset.

As to plaintiff having no contract for any definite time with the Association or Dorman, we know of no authority that will preclude recovery of damages in a tort action because contractual sales and purchases between plaintiff and Dorman's for better

than two years. The evidence shows that the Dormans wanted deliveries and plaintiff wanted to continue to make them, and it appears that such an extended business relationship at least presumptively would have prevailed indefinitely had it not been for the unauthorized picketing.

As to Point X which claims error in rejecting an affidavit by one Corbett having to do with plaintiff's relationship with the Association (which affidavit was filed after the trial), the facts recited therein were available to defendants during the trial by way of discovery or otherwise and there is no showing made of their nonavailability.

Point XI complains that the court erred in sustaining an objection to testimony that wages were less in another area than those paid by the Association. We can see no relevancy in such testimony as it might bear on an unlawful picketing situation between the union and the plaintiff, not the Association.

We believe the remaining points are not well taken: One having to do with admission of a letter requested to be produced by defendants, because it appears to have materiality in support of plaintiff's claim of union interference; another having to do with the introduction in evidence of an audit, because it appears to have been received without objection; and the last having to do with the contention that it was error not to have granted a new trial, because we fail to find any reasons stated therein warranting the granting thereof under our rules,* and defendants

* Rule 59, Utah Rules of Civil Procedure.

have failed to point out any of the grounds under said rules that would justify the granting thereof.

* WE CONCUR:

.....

ROGER I. MCDONOUGH, *Chief Justice*

.....

LESTER A. WADE, *Justice*

CROCKETT and WORTHEN, JJ., concur in results.

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* The foregoing opinion is reported at 8 Ut. 2d 124, 329 P. 2d 414 (1958).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 642

WESTERN CONFERENCE OF TEAMSTERS

Petitioner,

v.

DAIRY DISTRIBUTORS, INC.

Respondent.

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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Petitioner,

DAIRY DISTRIBUTORS, INC.

Respondent

Reply to Brief for the Respondent in Opposition

In Point III of its petition, the petitioner has sought to demonstrate that, in the interest of accommodating and harmonizing federal laws and policies, the policies of the Interstate Commerce Act (49 USC 1, et seq.), respondent should not be permitted to recover damages under the NLRA for injury to a business that has been operated in criminal violation of the ICA. In its Brief in opposition, respondent has made certain representations relative to this issue that require an answer.

Thus, respondent asserted the following:

"From the very start of this litigation, petitioner has asserted the claim of illegality of respondent's business. The conclusion is inescapable that petitioner has never been able to prove the facts upon which the claim of illegality must rest." Brief of Respondent, p. 3.

This assertion is not supported by the facts of this case. In the United States District Court below, respondent answered the complaint, in part, as follows: "The defendant

admits that it is a corporation, and that defendant operated its trucks without a certificate of convenience and necessity from the Interstate Commerce Commission." (R.40). On the basis of this admission and the evidence submitted relating to the respondent's interstate operation (Petition, p. 3), the District Court made the following finding of fact and conclusion of law:

> At all times complained of in the state court action the defendant, Dairy Distributors, Inc., was engaged in interstate commerce as a contract carrier by motor vehicle, hauling cheese from Utah to New York and hauling various other items from points in the East and Midwest to Utah. There was no evidence in the state court record, nor in the record here, that the defendant, Dairy Distributors, Inc., had a certificate of convenience and necessity from the Interstate Commerce Commission to engage in said trucking operation. There was, however, affirmative evidence in the state court record, and in the record here, and counsel for defendant admit, that defendant, Dairy Distributors, Inc., did not have such a permit, and such is the finding of this court. The engaging in interstate commerce without such a permit constitutes a criminal offense as provided in Title 49, Section 322, U.S.C.A. (R 46)
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> • • • • •
>
> The State court judgment was a recovery for injuries to an illegal business which was operating in violation of the laws and policy of the United States, and its enforcement should be enjoined to protect the interests of the United States, its citizens and the transportation of goods and merchandise in interstate commerce. (R. 48)
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> • • • • •

This finding and conclusion was left undisturbed by the Court below.

Respondent would further have us believe that the above decision was somehow inconsistent with action taken by the ICC. Thus, respondent supplies the following quotation from the opinion of the Court of Appeals below:

> The record here indicates that the Commission has licensed the appellant (respondent here) as a private carrier; no complaint of this action has been made to the Commission; and if damage arose as a result of improper licensing or improper use of the granted certificate, it is not apparent. (294 F. 2d 348, 353). (Brief of Respondent, p. 21)

In this respect, both the Court below and the respondent, neither of whom supplied a citation to the record, are clearly in error. There is not a shred of evidence in the record that the ICC issued a license or a certificate to the respondent as a private carrier.[1] Nor could there be any such evidence; for the Interstate Commerce Act, while requiring a certificate for contract carriers (Section 309) and common carriers (Section 306) and subjecting private carriers to certain safety regulations (Section 304(3)), does not empower or authorize the ICC to issue a license or certificate to private carriers.

Finally, respondent places the main brunt of its argument on the doctrine of res judicata. However, as noted in the Petition (p. 19, at footnote 11), the Court below rejected the application of that doctrine to the instant issue because it was not clear whether the state courts had considered and acted upon it.

It is respectfully submitted that the decision of the Court below failed to give due weight to the principle of accommodation of federal laws, contrary to the direction of this

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[1] This point was duly raised in the petition for rehearing in the Court below.

Court, and ignored the National Transportation Policy to the detriment of the entire transportation industry. Therefore, and for the other reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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